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NOTES.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND OF THE PRESS—RECENT DECISIONS—The frequent occurrence of the first amendment as a defense in recent cases bids fair to establish it as the most popular as well as the most versatile of the constitutional guaranties, the younger but lustier fourteenth amendment, of course, excepted. Whether its presence in a most heterogeneous aggregation of decisions is due to the decreasing vogue of the fourteenth amendment or can be ascribed to its own inherent potentialities, must be a matter of conjecture. Obviously, however, the term "freedom of speech . . ." can be used to cloak a multitude of social sins, and a precise delimitation of its meaning is desirable.

Certain things seem patent. Liberty of the press is not synonymous with license. "The constitutional provision is not a refuge for malicous slanderers and libelers."[1] Nor can it be interposed to defeat the operation of a Federal statute against the dissemination of obscene matter.[2] It does not prevent a court from punishing for contempt, whether committed within or without its presence.[3] A court may enjoin the publication of libellous matter or of articles intended to obstruct justice.[4] But whether under the wording of some of the state statutes, prevention instead of punishment of the unlawful speech or publication is constitutional, is exceedingly doubtful.[5] Some of the courts have taken the position that under a constitution providing that persons exercising liberty of speech or of the press shall be responsible for an abuse of that liberty, without specifying what shall constitute an abuse, the legality of any speech is to be determined by common law principles or by statutory declaration of the police power.[6]

The constitutional provision has been invoked in cases less obviously within its intendment. The Civil Service Act of 1876, which restricted the political activities of government officeholders, was attacked as contrary to the amendment. The act was upheld by a majority of the court, but the dissenting opinion of Justice Bradley to the effect that, "Neither men's mouths nor their purses can be constitutionally tied up in this way," foreshadowed the conflict in recent decisions upon similar questions.[7]

Statutes requiring the procurement of a license for theatrical performances have been held not to violate the constitutional provision.[8] In the large number of cases which contested the censorship of motion pictures, the first amendment was relied on as a defense, but the courts have been reluctant to extend the words "speech" and "press" beyond their usual meanings.[9] Lawyers who

[1] McDougall v. Sheridan, 128 Pa. 954 (1913); Hyde v. State, 159 Wis. 651 (1915).

[2] Tyonues Publishing Co. *et al.* v. U. S., 211 Fed. 385 (1914); Clark *et al.*, v. U. S., 211 Fed. 916 (1914).

[3] *In re* Fite, 11 Ga. App. 665 (1912); *In re* Egan, 123 N. W. 478 (S. Dak. 1909).

[4] U. S. v. Toledo Newspaper Co., 220 Fed. 458 (1915).

[5] *Ex Parte* Heffron, 162 S. W. 652 (1914).

[6] 32 L. R. A. 829; 34 L. R. A., N. S. 482.

[7] *Ex Parte* Curtis, 106 U. S. 371 (1882).

[8] Com. v. McGann, 213 Mass. 213 (1913).

[9] Mutual Film Corporation v. City of Chicago *et al.*, 224 Fed. 101 (1915); Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230. The court, speaking through Mr. Justice McKenna, said: "The first impulse of the mind is to reject the contention (i. e., that motion pictures came within the protection of the amendment). We immediately feel that the argument is wrong or strained which extends the guarantees of free opinion and speech to the multitudinous shows which are advertised on the billboards

have been disbarred for indiscreet and unprofessional utterances, and physicians whose licenses have been revoked for similar reasons, have fallen back upon their constitutional rights as a last resort, but without success.[10] In an anomolous and extraordinary case a member of a social club who had been expelled for the publication of an article reflecting upon his fellow-members, asked to be reinstated by judicial decree by virtue of the constitutional guarantee.[11]

Within the last few years two large classes of cases have arisen in which "freedom of speech . . ." is a very mooted phrase. The first arises out of the struggles of capital and labor. Here vagueness and inconsistency are the rule rather than the exception, with very marked differences in the attitude of the courts of the various sections of the country.[12] Where it was urged that a statute requiring a corporation to give a discharged employee the reason for his discharge, was unconstitutional, the court, summarily dismissed the objection with these words:[13]

"It does not take away the right of free speech or right to make, print or publish one's own opinion. It does require under certain conditions that an employer shall speak the truth in regard to the ex-employee."

The second class of cases in which the constitutional amendment figures strongly relates to that large and increasing body of legislation which seeks to control the conduct of elections, limit the expenses of candidates and keep certain offices without the arena of politics. Here the first amendment has proved to be a serious obstacle to what is admittedly salutary and progressive legislation.[14] Some of the courts, in whole-hearted sympathy with these

of our cities and towns, and which regards them as emblems of public safety . . . and which seeks to bring motion pictures into practical and legal similitude to a free press and liberty of opinion. It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit like other spectacles, not to be regarded nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion."

[10] People v. Apfelbaum, 251 Ill. 18 (1911).

[11] Barry v. The Players, 130 N. Y. S. 701 (1911). The court said, *inter alia:* "If no member of a social club could be expelled for any act which he had a constitutional right to commit, no matter how unpardonable such act might be from a social standpoint or from the standpoint of a particular social organization, then manifestly it would be impossible to preserve the continued existence of organizations, the breath of whose life is congeniality and harmony in respect to matters wholly unsusceptible of measurement or control by such instruments as constitutions and laws."

[12] *Ex Parte* Heffron, *supra.*

[13] St. Louis Southwestern Rwy. Co. v. Hixon, 126 S. W. 338 (Tex. 1909); Affd. in 162 S. W. 383 (Tex. 1913).

[14] In State v. Junkin, 85 Neb. 1 (1909), a divided court held unconstitutional a statute which provided that "candidates for judicial and educational

acts, have confined the amendment within very narrow limits. Where the constitutionality of a statute which forbade a candidate from expending in his election campaign more than fifteen per cent. of the yearly salary of the aspired office, was involved, the court said:[15]

"It is argued that said provisions are contrary to the provisions of Sec. 9 of Art. 1 of our state constitution, which is as follows: 'Every person may freely speak, write or publish on all subjects, being responsible for the abuse of that liberty.' There is nothing in that contention.

"The provisions of the primary election law in regard to the expenditures of a person aiding or promoting his nomination for an office in no manner conflict with said provisions of the constitution. That law does not attempt to prevent a candidate from *freely*[16] speaking, writing and publishing his views on all subjects."

A very recent case[17] adopts an essentially dissimilar point of view. A statute of the state forbade one, not a candidate nor a committeeman, from spending money outside his own county for political purposes. A majority of the court held that the statute infringed the constitutional freedom of the press, giving the term its broadest meaning.[18] The dissenting opinion, in its desire to effectuate the admirable aim of the act, would fritter away the substantial protection of the constitutional provision by "subordinating it to the great leading purpose for which constitutional governments have been established—to form a more perfect government . . . to promote the general welfare . . ." Such an interpretation of the first amendment, while permitting the more speedy adoption of needful legislation after the manner of the Idaho court, would emasculate the term "freedom of speech."

offices shall not be nominated, indorsed, recommended, censured, criticised or referred to in any matter by any political party or any political convention or primary." So, also, in *Ex Parte* Harrison, 212 Mo. 88 (1908), the court held unconstitutional a statute making criminal the publication by a civic league of any report concerning candidates for office without stating in full the facts upon which the report is based and the names and addresses of all persons furnishing the information.

[15] Adams v. Lansdon, 18 Idaho 483 (1910).

[16] The italics are the writer's.

[17] State v. Pierce, 158 Wis. 696 (1916). The court, speaking through C. J. Winslow, said: "The defendant being a citizen of Roth County, spent money in Dane County, gathering facts concerning governmental affairs and in communicating those facts to the people of the state at large with the intent of influencing the voting at an approaching election. This cannot be made a criminal act while the constitutional guaranties of speech and freedom of the press remain as they now are."

[18] Mr. Justice Siebecker, saying, *inter alia*: "Where the abuse of the purity of elections begins, through whatever means it might be accomplished, liberty of speech and press must end, for without such a check, this right could be made a most effective instrument of mischief."

It is submitted that the attitude of the majority of the Wisconsin court, is the more tolerant and the more wholesome. Though the purpose of the contested law be most praiseworthy, though it express the keen desires of a progressive community, the remonstrant who relies upon the constitution is entitled to a respectful hearing.

With the struggle between capital and labor growing more acrimonious, and with the increase of reform legislation of doubtful constitutionality, the future looms bright for the first amendment.

B. W.

JUDGMENTS—RELIEF IN EQUITY AGAINST JUDGMENTS AT LAW.—The power of equity to relieve against judgments at law when fraudulently obtained or where some strong natural equity can be alleged against them, although it is at the present day so firmly established, was violently resisted by the common law lawyers and judges. Fraud being the original attaching point of equity jurisdiction, it was natural that one of the very first subjects to engage the attention of the English chancellors was that of equitable interference with a judgment of a law court obtained by fraud. The question whether a court of equity could give relief for or against a judgment at common law was the subject of the famous controversy in the reign of James I, which was conducted principally by Lord Coke against, and by Lord Ellesmere in favor of, the chancery jurisdiction, and which was finally decided in favor of the latter.[1] From that time down to this day the jurisdiction has been repeatedly exercised by courts of equity and it remains only to consider under what circumstances they will act and what is the nature of the relief.

At the outset it is well to remember that judgments are not reversed or vacated in equity. The adjudications at law are not overhauled or re-examined. It is to the party himself that the energies of the court of equity are directed and its remedial power is exercised by placing restraint upon his usual right to follow up his judgment by the appropriate process for its collection. Equity therefore acts on the person in this, as in all matters; and while it will enjoin the enforcement of a judgment in a proper case, it will not interfere with the judgment itself.[2] Cases sometimes arise where the right to move for a new trial at law was lost in consequence of some of the circumstances which equity always regards

[1] I Story's Equity, Sec. 51.

[2] Harding v. Fiske, 12 N. Y. Supp. 139 (1890); Justice v. Scott, 39 N. C. 108 (1845). But equity may reform a judgment, by the addition of something omitted through mistake, when due cause therefor is shown, Hamburg Ins. Co. v. Pelzer Co., 76 Fed. 479 (1896).